No. 80-1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY "MIKE" GARRISON,
Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

On Appeal from the Supreme Court of Illinois

REPLY BRIEF OPPOSITION MOTION TO DISMISS

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TABLE OF CONTENTS

	Page
Jurisdiction	1
The Statute	4

AUTHORITIES CITED

Arceneaux v. Louisiana (1964), 376 U.S. 336, 84 S.Ct. 777, 11 L.Ed.2d 750	2
Attwood v. Purcell (1975 D.C.Ariz.), 402 F.Supp. 231	4
Chapman v. California (1972), 405 U.S. 1020, 92 S.Ct. 1284, 31 L.Ed.2d 483	2
Connally v. General Construction Co. (1926), 269 U.S. 385, 70 L.Ed. 322, 328, 46 S.Ct. 126	4
Cox Broadcasting Corp. v. Kohn (1975), 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029	3
Eastman v. Ohio (1936), 299 U.S. 505, 81 L.Ed. 374	2
Mercantile National Bank v. Langdeau (1963), 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520	3
Miller v. California (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607	5
Mills v. Alabama (1966), 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434	3
Parr v. United States (1956), 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377	2
Smith v. Goguen (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605, 609	4

United States v. Harriss (1954), 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 4

United States v. Wiltberger, 18 U.S. 5. Wheat. 76, 95, 96, 5 L.Ed. 37, 42 7

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I.

JURISDICTION

On the question of jurisdiction, appellee fails to take into account:

(1) Appellant is charged in two separate cases, which would, in the proper defense of appellant, require three separate trials. A consolidation would adversely affect the prospect of a successful defense.

(2) Appellant should not be tried even on one charge based upon an unconstitutional statute.

Neither factor was present in the cases upon which appellee relies.

In *Parr* v. *United States* (1956), 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377 relied on by appellee, the Order appealed from permitted the government to dismiss a criminal case in one district over appellant's objection, after the government had reindicted appellant in another district.

This Court held that even assuming the Order's finality, the accused was not aggrieved by such dismissal and could not appeal.

There was no issue of the criminal statute's constitutionality involved.

Moreover, *Parr* held at page 100 L.Ed. 1384:

> "...The Order dismissing the Corpus Christi indictment was but an interlocutory step in this prosecution, and its review must await the conclusion of the 'whole matter litigated' between the Government and the petitioner—namely, 'the right to convict the accused of the crime charged in the indictment.' *Heike* v. *United States, supra* (217 US at p 429)."

Such holding does not fit the instant case. There is no right of the State of Illinois to "convict the accused of the crime charged in the indictment." No one should even be tried, once, twice or three times, let alone convicted, under an unconstitutional criminal statute.

The same may be said in regard to the other cases relied on by appellee, namely, *Chapman* v. *California* (1972), 405 U.S. 1020, 92 S.Ct. 1284, 31 L.Ed.2d 483, *Arceneaux* v. *Louisiana* (1964), 376 U.S. 336, 84 S.Ct. 777, 11 L.Ed.2d 750, and *Eastman* v. *Ohio* (1936), 299 U.S. 505, 81 L.Ed. 374. In *Chapman,* decided in 1972, the dissent of Mr. Justice Douglas, joined by Mr. Justice Brennan and Mr. Justice Marshall, contains significant

references to cases relied on in the instant case, namely, *Mills* v. *Alabama* (1966), 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434, and *Mercantile National Bank* v. *Langdeau* (1963), 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520. In the dissent of Mr. Justice Brennan appears the pertinent statement particularly applicable to the instant case:

> "The purpose of furthering economy in judicial administration would plainly be served by deciding these questions now rather than by sending petitioner through the formalities of a trial and months—if not years—of repetitious appellate review before allowing him to present to this Court again the very issues that are here now."

Appellee acknowledges that *Cox* allowed an appeal, even though there were further proceedings to be heard in the State Courts (page 3), and that "the finality requirement is not rigid." (page 4). Appellee ignores the fact that the Illinois Public Indecency Act can involve First Amendment Rights. Appellee ignores the holding in *Langdeau* wherein this Court took jurisdiction to hear that appeal which involved review of a venue question. Appellee makes no answer to the position of appellant that determination of whether there even need be a trial is at least as persuasive on the issue of jurisdiction as is the question of the place of trial involved in *Langdeau*.

Appellee cites no logical reason for withholding jurisdiction at this stage of the proceeding, whereas all logic supports appellant that now is the time to protect a person from multiple trials under an unconstitutional statute on an allegation that is devastating to the reputation of the accused and yet an accusation which involves no victim at all.

II.

THE STATUTE

Appellee relies on the case of *United States* v. *Harriss* (1954), 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, in opposition to appellant's position that the Illinois Public Indecency Statute violates the Due Process Doctrine of vagueness with reference to the statutory language "lewd exposure of the body".

Harriss is not in point as a reading of the case clearly reflects. The Federal Lobbying Act was there involved. Under the construction given it by this Court, the disclosure provisions were held not unconstitutionally vague.

It is apparent appellee has no ground to distinguish *Smith* v. *Goguen* (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605, 609, and *Attwood* v. *Purcell* (1975 D.C.Ariz.), 402 F.Supp. 231, which cases cited by appellant are clearly in point. For obvious reasons, appellee makes no attempt to distinguish them but ignores them and cites only *Harriss,* which is totally inapplicable. The Court's pronouncement in *Harriss* is a far cry from the question of whether "lewd exposure" is unconstitutionally vague and standardless. As stated in the dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black concurs, the test of *Connally* v. *General Construction Company* (1926), 269 U.S. 385, 70 L.Ed. 322, 328, 46 S.Ct. 126, is whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

It is no answer for appellee to limit consideration on the vagueness question to the understanding of an accused charged under a criminal statute. It is equally essential to a proper determination that the statute not involve such a "standardless sweep" that juries and prosecutors may pursue their own predilections in determining what particular exposure of what part of the body is proscribed by the Legislature as a "lewd ex-

posure". It is the lack of standards defining "lewd" exposure of the body that resulted in the Court's striking down the statute in *Attwood,* and it was the lack of standards defining "contemptuous treatment" of the flag that resulted in this Court striking down the Massachusetts flag misuse statute in *Smith* v. *Goguen.*

Appellee has shown no legitimate reason why the same lack of standards defining lewd exposure of the body should not result in striking down the Illinois Public Indecency Statute.

Appellee misapprehends appellant's position on scienter. There is nothing in the statutory provision "with intent to arouse" himself that constitutes the necessary statutory intent that another person see the actor at the time of exposing some part of the body. Exposure of the body simply means to uncover the body. Search the statute for a requirement that the actor *intend* another viewer to see the act—it is not there. Nor is there any statutory requirement that the actor *intend* to affect the viewer in any manner.

Appellee also misapprehends defendant's position regarding a comparison of the Illinois Obscenity Statute and the Illinois Public Indecency Statute.

Appellant's position is basic: Inasmuch as *Miller* type standards define the word "obscene" in the Illinois Obscenity Statute, which criminalizes the performance of "an obscene exhibition of his body for gain", the appellant, when prosecuted for an alleged violation of the standardless Illinois Public Indecency Statute, is denied equal protection under the Fourteenth Amendment in that he is not accorded protection by standards defining the word "lewd", whereas a person prosecuted under the Illinois Obscenity Statute for performing the same act on a public stage would be accorded standards defining the word "obscene". There is no rational reason to accord the former less protection than the latter. There is no legitimate state interest promoted by such an arbitrary classification based on nothing but semantics, namely: the legislative choice of the

words "lewd exposure of the body" in the Public Indecency Statute, and "obscene exhibition of his body" as used in the Illinois Obscenity Statute.

Appellee seeks to rely on the charge itself in considering the statute's unconstitutionality. Nothing stated in the Information filed against appellant can cure the statutory deficiency. The dissent in *Harriss* relied on by appellee, addresses this question as follows at 98 L.Ed. 1002:

> "...As stated in *Lanzetta* v. *New Jersey*, 306 US 451, 453, 83 L ed 888, 890, 59 S Ct. 618P
>
> > 'If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . .' "

Appellee also ignores appellant's position on the overbreadth doctrine. The Illinois Public Indecency Statute *can* implicate First Amendment rights of others. There is nothing within it which would prevent prosecution of a performer on a public stage under its terms, whether or not the performance was done for gain. Consequently, even though appellant is not on the public stage, he has standing to and does challenge the validity of the statute since the existence of the statute may inhibit expressive rights of others protected by the First Amendment, even though the defendant in his private home was not charged as a performer on the public stage.

Appellee does not address appellant's position on the ex post facto judicial enlargement of the statute by the Illinois Supreme Court's interpretation that a private home comes within the meaning of the Public Indecency Statute. Nor does appellee explain away the obvious error of the Illinois Supreme Court in applying the civil rather than the criminal statutory construction

rule. A properly applied strict construction should not broaden this statute to include "private home" within the definition "public place". The issue is not what appellee thinks the legislature intended. As stated by Chief Justice Marshall, it "is the legislature, not the court, which is to define a crime." *United States* v. *Wiltberger,* 18 U.S. 5. Wheat 76, 95, 5 L.Ed. 37, 42.

Judicial enlargement of the statute to correct what the Court believes to be a legislative error is prohibited by the ex post facto clause to the same extent as would be an amendatory statute passed by the Legislature to correct its own error. Thus, the judicial enlargement in this case should not be upheld to the prejudice of appellant.

Appellee also misapprehends the question of privacy. A person in his own home has the right to protection from prosecution for an act of "sexual intercourse" or "lewd exposure" when seen, *through no intent of the house owner,* by a passerby or peeping tom. Nothing in the statute requires proof of intent by the actor that he be seen by another person. Therefore, every house owner is in jeopardy under the terms of this statute. Here again, the overbreadth doctrine should apply, and appellant has standing to raise the question, not only of the statutory breach of his own constitutionally protected right of privacy, but also the statutory breach of the privacy rights of others and the inhibiting effect of the statute on the exercise of privacy rights in the home. Again, appellee confuses the issue (Motion page 4). It is not the wording of the charge, it is the wording of the statute that is involved.

Appellee's Motion to Dismiss the Appeal should be denied.

Respectfully submitted,

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